



RESEARCH PAPER 99/49
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The Northern Ireland (Location of Victims' Remains) Bill

Bill 92 of 1998-99

This Bill is designed to give effect to an international agreement entered into by the UK and Irish Governments which will establish a commission to facilitate the location of the remains of victims of violence, otherwise known as 'The Disappeared'. A similar Bill has been introduced into the Dail. The Paper looks at recent developments since the *Belfast Agreement* of 10 April 1998 and examines the background to attempts to locate the graves of 'The Disappeared' and the decision of the UK and Irish Governments to prohibit the use of evidence uncovered as a result of the Commission's work in criminal proceedings. It also sets out the Bill's provisions in detail. The Bill is due for debate on Second Reading on 10 May 1999, and is expected to complete all its Commons stages on 12 May.

Oonagh Gay

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Summary of main points

The *Belfast Agreement* of 10 April 1998 provided for the creation of a Northern Ireland Assembly and a powersharing Executive. It also contained provisions for the early release of prisoners connected with terrorist organisations and for the decommissioning of paramilitary weapons. Although progress has been made with the implementation of the Agreement, no Executive has yet been set up, due to continuing disputes about the decommissioning requirements of the Agreement.

A number of people have gone missing in Northern Ireland in the last 25 years as a result of the activity of proscribed organisations and their remains have not been located. These people are generally known as 'The Disappeared'. On 29 March 1999 the British and Irish Governments announced that they would consider amending the law to ensure that evidence uncovered during the location of remains would not be admissible in criminal proceedings. On 27 April 1999 the two Governments signed an Agreement to establish an Independent Commission for the Location of Victims' Remains.

The *Northern Ireland (Location of Victims' Remains) Bill* had its first reading on 27 April 1999. Explanatory Notes to the Bill are available as *Bill 92-EN*. A similar bill, the *Criminal Justice (Location of Victims' Remains) Bill 1999* has been introduced into the Dail. The UK bill provides for the creation of the Commission. It defines a 'victim' as someone killed before 10 April 1998 on behalf of, or in connection with, a proscribed organisation. It also provides for the inadmissibility of evidence in criminal proceedings which comes to light as a result of 'relevant information' on the location of remains being passed to the Commission. The Bill also places restrictions on forensic testing of remains or items found with remains, but does not prohibit such tests for the purpose of a post mortem and inquest. The Bill restricts the disclosure of information by the Commission unless for the purpose of facilitating locations, although the Commission has discretion to disclose this information to the family of a victim. There are provisions to seek warrants in order to enter and search premises where victims remains are likely to be found.

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I Introduction and Background

Various Research Papers deal with the *Belfast Agreement* and its implementation; the following papers are relevant:

- Research Paper 98/57 *Northern Ireland : Political Developments since 1972*
- Research Paper 98/65 *Northern Ireland: The Release of Prisoners under the Northern Ireland (Sentences) Bill*
- Research Paper 98/76 *The Northern Ireland Bill: Implementing the Belfast Agreement*
- Research Paper 98/87 *The Criminal Justice (Terrorism & Conspiracy) Bill*

A full examination of the implementation of the *Belfast Agreement* is beyond the scope of this paper. However the main political developments are listed below.

The *Agreement* of 10 April 1998 proposed an overall settlement of the constitutional and security position of Northern Ireland, to feature:

- new legislation by both the UK and Irish governments
- a new Northern Ireland Assembly
- a new North/South Ministerial Council
- a new British-Irish Council to bring together representatives from devolved administrations and the two governments
- a new British-Irish Agreement to replace the 1985 *Anglo-Irish Agreement*
- a process for decommissioning weapons held by paramilitary groups
- a programme for the accelerated release of paramilitary prisoners.
- the creation of a Northern Ireland Human Rights Commission and an Equality Commission
- an independent commission to make recommendations for future policing arrangements in Northern Ireland.

The *Belfast Agreement* was endorsed by a referendum on 22 May 1998 in both Northern Ireland and the Republic. In Northern Ireland, 71 per cent of those voting, on an 81 per cent turnout, backed the agreement. In the Republic, 94 per cent, on a 56 per cent turnout, were in favour. Elections to the new Northern Ireland Assembly were held on 25 June 1998 under the *Northern Ireland (Elections) Act*, which completed its passage through Parliament on 7 May 1998. The SDLP gained the highest percentage of first preference votes (21.96%) for the first time in a Northern Ireland election, with the UUP following at 21.26%.

Election for the Northern Ireland Assembly, 25 June 1998:	
Number of seats gained by each party	
Ulster Unionist Party (UUP)	28
Social Democratic and Labour Party (SDLP)	24
Democratic Unionist Party (DUP)	20
Sinn Fein	18

**Election for the Northern Ireland Assembly, 25 June 1998:
Number of seats gained by each party (continued)**

UK Unionist Party	5
Alliance Party	6
Independent Unionists (anti-agreement)	3
Progressive Unionist Party	2
Womens Coalition	2
Total	108

The Assembly had its first meeting on 1 July. David Trimble and Seamus Mallon were elected First and Deputy First Minister respectively.

The *Northern Ireland Act* implemented major elements of the Agreement. It was introduced in the Commons on 15 July 1998 and completed its Commons stages on 31 July. The Act sets out the constitutional status of Northern Ireland and repeals the *Government of Ireland Act 1920*. It transfers legislative functions to the Northern Ireland Assembly, and executive functions to the First Minister and Deputy First Minister, once sufficient progress has been made in implementing the Agreement. In particular the Agreement states that North-South Ministerial Council has to begin its work before the shadow Assembly can take up its full role.

The Assembly will be able to legislate on transferred matters. Excepted and reserved matters will remain with the UK Parliament. Elections to the Assembly are now to be covered under the *Northern Ireland Act*, but there are still to be 108 members elected by the Single Transferable Vote. The First and Deputy First Minister are elected under a cross community support procedure, which is also to be used for major decisions, including the removal of ministers, where they are considered to no longer have the confidence of the Assembly. There is to be an Executive Committee consisting of the First and Deputy First Minister and a maximum of 10 other Northern Ireland Ministers. The *Northern Ireland Act* was passed on 19 November 1998. There were considerable amendments to the Act during its passage through Parliament, but mainly relating to the Human Rights Commission and the Equality Commission.¹

The *Northern Ireland (Sentences) Act 1998* was introduced in the House of Commons on 4 June 1998 and received the Royal Assent on 28 July. The Act is intended to implement the part of the Belfast Agreement dealing with prisoners and incorporate the commitments given by the Prime Minister during the Referendum campaign in Northern Ireland. The main features of the Bill were described as follows in a Northern Ireland Office press release of 5 June 1998:

¹ For background on to constitutional position of Northern Ireland following the *Northern Ireland Act 1998* see Brigid Hadfield in *Public Law* Winter 1998 'The Belfast Agreement, Sovereignty and the State of the Union'

- It establishes an independent body, the Sentence Review Commissioners, to review each case prisoner by prisoner.
- Prisoners who belong to organisations which have not declared and are not maintaining complete and unequivocal cease-fires will not be considered for release.
- Those prisoners who are judged to be a danger to the public will not be released.
- Those who are released will be on licence and can be re-imprisoned if they become involved with terrorism again.

The *Criminal Justice (Terrorism and Conspiracy) Act 1998* was passed during the recall of Parliament on 2 and 3 September 1998 following the Omagh bombing of 15 August.

The *Northern Ireland Act* provided for a new Northern Ireland powersharing Executive, with a maximum of ten ministers (excluding the First and Deputy First Ministers) (s17(4)). The Executive has yet to be appointed, as agreement on the interpretation of the Agreement's provisions on decommissioning has yet to be reached.

There were negotiations between the Northern Ireland parties represented in the Assembly as to the number of ministries which should exist in the Northern Ireland administration. Agreement on the number of ministries was reached on 18 December 1999 as part of a broader negotiation on the number of North South implementation bodies.² As a result-

- Ten ministries are to be set up under the terms of the *Departments (Northern Ireland) Order 1999*³: Office of the First Minister and deputy First Minister; Department of Agriculture and Rural Development, Department of Culture, Arts and Leisure, Department of Education, Department of Enterprise, Trade and Investment, Department of the Environment, Department of Finance and Personnel, Department of Health, Social Services and Public Safety, Department of Higher and Further Education, Training and Employment, Department for Regional Development, Department for Social Development.
- The *North/South Cooperation (Implementation Bodies (Northern Ireland)) Order 1999*.⁴ made provision for six implementation bodies in domestic legislation. These were: inland waterways, food safety, trade and business development, special EU programmes, language (Irish and Ulster Scots) Aquaculture and Marine Matters.
- Treaties have been signed by the British and Irish governments on the British Irish Council, the new British Irish Intergovernmental Council, the Implementation Bodies and the North-South Ministerial Council.⁵ All were required to implement the *Belfast*

² The First and deputy First ministers issued a statement on 18 December which formed a basis for their interim report to the Northern Ireland Assembly which was discussed and agreed on 18 January 1999. This was followed by a final report which was agreed by the Assembly on 15 February 1999

³ SI 1999 no 283 (N.I.1)

⁴ see HC Deb 8 March 1999 vol 327 at c 120-140 for the Commons debate on the Order

⁵ The Treaties were signed on 8 March 1999. The text of these Treaties can be found on the Northern Ireland Office website accessible from www.open.gov.uk

Agreement. Implementation of the treaties awaits the establishment of the Northern Ireland Executive.

Chris Patten was appointed to head the Independent Commission on Policing, which is expected to report in summer 1999. The Human Rights Commission was brought into existence on 1 March 1999.⁶

However a number of deadlines set for the Executive to be established have not been met, following continued disagreements over the decommissioning of arms. Mo Mowlam set out an implementation timetable in January 1999. This stated that,⁷

- Shadow ministers should be appointed by the d'Hondt procedure
- The Assembly would agree standing orders
- The Parliament would debate the draft Devolution order, appointing a day for the transfer of powers
- On the appointed day powers would be transferred to the Northern Ireland Ministers and the Assembly, the British-Irish Agreement (annexed to the *Belfast Agreement*) would come into force, changes to Articles 2 and 3 of the Irish Constitution, and the British constitutional changes in sections 1 and 2 of the *Northern Ireland Act* would take effect, the North-South Ministerial Council, the British Irish Council and the British Irish Intergovernmental Conference would be established. The six implementation bodies, agreed on 18 December, would be established and the 1985 Anglo-Irish Agreement would cease to have effect.

But the deadline of 10 March to use the d'Hondt procedure was not achieved⁸, and a series of intensive negotiations have been held since then. Negotiations have continued to try to resolve the decommissioning issue and establish an executive. An attempt to finalise discussions was met in the week before Easter and on 1 April 1999 the Prime Minister and the Taoiseach issued a joint Declaration, known as the Hillsborough Declaration. Mr Blair said:

'The Declaration we are publishing sets out a process by which we will, within the next few weeks, establish all the institutions: the executive; the North/South Ministerial Council, the North/South Implementation Bodies, the British/Irish Council and the British/Irish Inter-Governmental Conference.

The Declaration states too that while there is no pre-condition to decommission, there is an obligation to decommission.

The Declaration sets out how:

⁶ *The Northern Ireland Act 1998 (Commencement no. 1) Order 1999*; SI 1999 no 340 (C.6)

⁷ *Northern Ireland Information Service* 13 January 1999, 'Mowlam sets out steps to finishing line'

⁸ *Northern Ireland Office Press Notice* 8 March 1999, 'Mowlam sets date for d'Hondt'

- nominations will be made under the d'Hondt procedure of those to take up office as Ministers, when powers are devolved;
- at a date not later than one month from the d'Hondt procedure is run, a collective act of reconciliation will take place which will see arms put beyond use on a voluntary basis, in a manner verified by the Independent International Commission on Decommissioning. General de Chastelain is making a statement in support of this today.
- within the same timescale, the Independent International Commission on Decommissioning will make a report on progress. It would be understood by all that the successful implementation of the Agreement will only be achieved if the steps above are taken within the proposed timescales; if not, the nominations would have to be confirmed by the Assembly.
- around the time of the act of reconciliation, powers will be devolved and the British-Irish Agreement will enter into force to set up the institutions.
- in addition, we envisage further moves on normalisation and demilitarisation in recognition of the changed security situation.'

The full text is set out below:

DECLARATION

It is now one year since the Good Friday Agreement was concluded. Last May, it was emphatically endorsed by the people, North and South, and as such it now represents their democratic will.

The Agreement, in its own words, offers a truly historic opportunity for a new beginning. It gives us a chance, in this generation, to transcend the bitter legacy of the past and to transform relationships within Northern Ireland, between North and South, and between these islands.

All parties firmly believe that the violence we have all lived through must be put behind us. Never again should we or our children have to suffer the consequences of conflict. It must be brought to a permanent end. In partnership together we want to ensure a future free from conflict.

The realisation of that future places heavy obligations on us all, individually and collectively. The implementation in full of the Agreement is inevitably a lengthy and complex process, involving continuing effort and commitment on all our parts.

It is encouraging and important that, even though much remains to be done, very substantial progress has already been made in turning the promise of the Agreement into a reality. We must not forget or underplay how far we have already come.

Balanced changes both to the Irish Constitution and to British constitutional legislation based on the principle of consent, have been approved and are ready to take effect.

The Northern Ireland Assembly was elected last June and has since then been preparing for devolution. The international agreements signed in Dublin on 8 March provide for the establishment of the North/South Ministerial Council and Implementation Bodies, the British-Irish Council and the British-Irish Intergovernmental Conference.

The Northern Ireland Human Rights Commission has been established and its members appointed, and the new Equality Commission has been legislated for. Comparable steps by the Irish Government are well under way.

The needs of victims of violence, and their families, including those of the disappeared, are being addressed in both jurisdictions, though we acknowledge that for many their pain and suffering will never end. The commitments in the Agreement in relation to economic, social and cultural issues, including as regards the Irish language, are being carried forward, though much of this work is inevitably long-term.

Steps have been taken towards the normalisation of security arrangements and practices, while the Commission on Policing for Northern Ireland and the review of criminal justice are both well advanced in their vital work.

Numerous prisoners, in both jurisdictions, have benefited from mechanisms providing for their accelerated release.

Against this background there is agreement among all parties that decommissioning is not a pre-condition but is an obligation deriving from their commitment in the Agreement, and that it should take place within the timescale envisaged in the Agreement, and through the efforts of the Independent International Commission on Decommissioning.

Sinn Fein have acknowledged these obligations, but are unable to indicate the timescale on which decommissioning will begin. They do not regard the Agreement as imposing any requirement to make a start before the establishment of the new institutions. The UUP do not wish to move to the establishment of the new institutions without some evident progress with decommissioning.

It would be a tragedy if this difference of view about timing and the sequence of events prevented the implementation of the Agreement from advancing. We believe that decommissioning will only happen against a background where implementation is actively moving forward. Continued progress in establishing the new institutions will in itself create greater confidence. On the other hand, it is understandable that those who take the next steps in implementation should seek to be assured that these steps are not irrevocable if in the event no progress is made with decommissioning.

We therefore propose the following way forward.

On [date to be set] nominations will be made under the d'Hondt procedure of those to take up office as Ministers when powers are devolved.

At a date to be proposed by the Independent International Commission on Decommissioning, but not later than [one month after nomination date] a collective act of reconciliation will take place. This will see some arms put beyond use, on a voluntary basis, in a manner which will be verified by the Independent International Commission on Decommissioning, and further moves on normalisation and demilitarisation in recognition of the changed situation on security. In addition to the arrangements in respect of military material, there will at the time be ceremonies of remembrance of all victims of violence, to which representatives of all parties and the two Governments, and all churches, will be invited.

Around the time of the act of reconciliation, powers will be devolved and the British/Irish Agreement will enter into force. The following institutions will then be established: the North/South Ministerial Council, the North/South Implementation Bodies, the British/Irish Council and the British/Irish Intergovernmental Conference.

By [one month after nomination date], the Independent International Commission on Decommissioning will make a report on progress. It is understood by all that the successful implementation of the Agreement will be achieved if these steps are taken within the proposed timescales; if they are not taken, the nominations mentioned above will fall to be confirmed by the Assembly.

However when the talks reconvened after Easter Sinn Fein and the PUP indicated that they could not accept the Declaration⁹. New rounds of negotiation have begun and are continuing. According to an opinion poll on behalf of the *Irish Times* support for the Agreement remains strong with 73 per cent of those polled stating their support, but 47 per cent would not accept the formation of an Executive without decommissioning.¹⁰

A. Prisoner Releases

According to a recent Parliamentary Answer, as of 16 April 1998, 82 prisoners convicted of murder have been released under the accelerated release scheme set up by the *Northern Ireland (Sentences) Act 1998* and 259 prisoners in total have been released under the scheme.¹¹ There has been concern expressed by Opposition spokesmen at the scale of prisoner releases¹², given the lack of progress on decommissioning, but the Government position has been that there was no explicit linkage between the two in the Belfast Agreement. Only prisoners who were convicted before 10 April 1998 can benefit from the

⁹ *Scotsman* 9 April 1999 'Sinn Fein rejects Hillsborough declaration'

¹⁰ *Belfast Telegraph* 27 April 1999 'Ulster split over future of Good Friday deal'

¹¹ HC Deb 28 April 1999 vol 330 c 185W

¹² see for example Lord Mayhew in *Daily Telegraph* 4 February 1999 'Early Releases Must Stop for the Sake of Peace'

release scheme.¹³ Andrew Mackay, Northern Ireland Opposition spokesman, has called for the halting of the early release of prisoners until the IRA makes progress on decommissioning, most recently in *Daily Telegraph* 28 April 1999.¹⁴ There was an Opposition Day debate on the subject of decommissioning and prisoner releases on 9 December 1998.¹⁵ During this debate Mo Mowlam said in response to Andrew Mackay:¹⁶

The right hon. and learned Gentleman referred to halting the accelerated release of prisoners. He well knows that that can be done under the agreement if the ceasefire is no longer unequivocal or is no longer maintained. That is the basis in the agreement and in the Northern Ireland (Sentences) Act 1998 of calling a halt to the process.

At the beginning of his speech, the right hon. Member for Bracknell made it clear that he accepts from the security forces, the police and from the advice to me that the ceasefire is intact. Therefore, there is no basis in the agreement for me to act when the evidence - not allegations - that I receive is that the ceasefire is valid....

We made it clear at the outset that decommissioning is an obligation, not an option, under the agreement. We and the Irish Government are doing all that we can to hold the parties and the respective paramilitary organisations to that obligation. Both Governments are clear that the parties signed up to complete the decommissioning of all arms within two years - it is important that Opposition Members take note of that.

B. Decommissioning

The Mitchell Commission of January 1996¹⁷ advocated an independent commission to verify decommissioning but which would not expose individuals to prosecution. It stated: 'information obtained as a result of the decommissioning process should be inadmissible as evidence in courts of law in either jurisdiction' (para 48). In August 1997 the British and Irish Governments signed the agreement establishing the International Commission on Decommissioning and General John de Chastelain was appointed Chairman.

¹³ *Northern Ireland (Sentences) Act 1998* s3(7)

¹⁴ 'It is time to take on terror'

¹⁵ HC Deb vol 322 c 329-380

¹⁶ c 339

¹⁷ *Report of the International Body* 22 January 1996. Background is given in Research Paper 98/57

Both Governments have issued decommissioning schemes which were announced on 29 June 1998.¹⁸ Under the *Northern Ireland Arms Decommissioning Act 1997*, passed by the Major Government,¹⁹ decommissioning schemes can be set up and anyone acting in accordance with a decommissioning scheme can hand in arms and explosives and benefit from an amnesty in respect of the offences set out in the schedule to the 1997 Act; the Act set the amnesty period for one year, but provided the power for it to be renewed by order, one year at a time, for up to five years. The *Northern Ireland Arms Decommissioning Act 1997 (Amnesty Period) Order 1999* has now extended the period until 24 February 2000.²⁰ Similar legislation was passed in the Republic of Ireland.²¹

The scheme allows weapons to be decommissioned either through the provision of information to the Independent International Commission on Decommissioning so that it can collect and destroy the arms, or by the destruction of the arms by those who possess them. Other options are available, such as handing weapons over to the commission to destroy. However proper verification is essential to the implementation of the scheme. So far only the Loyalist Volunteer Force have begun decommissioning on 18 December 1998. The Commission verified and destroyed guns and explosives.

C. Victims of the Troubles

Sir Kenneth Bloomfield, the former Head of the Northern Ireland Civil Service was appointed the Northern Ireland Victims' Commissioner in November 1997 by the Secretary of State for Northern Ireland. The *Belfast Agreement* welcomed the creation of the Commission but produced no further specific proposals for its work. The Commission produced a report in April 1998 which acknowledged that many victims had been left unsupported.²² The report recommended a victims champion or ombudsman, a review of the compensation system, an annual Memorial and Reconciliation Day, better counselling facilities and a garden of remembrance.²³

¹⁸ *Northern Ireland Office PN 29 June 1998 'Decommissioning Schemes Introduced'*. The British scheme is non statutory but both schemes are designed to be consistent with each other. See Adam Ingram, then junior NIO minister, during the debate on the 1997 Order in the second standing committee on delegated legislation 11 March 1998

¹⁹ Royal Assent was granted on 27 February 1997

²⁰ S1 1999 no 454. The Order revoked the 1998 Order which had extended the amnesty period until 27 February 1999. The Opposition supported the Order during the debate on its passage in the Commons (HC Deb 22 February 1999 vol 326 c 131-152)

²¹ *Decommissioning Act 1997*

²² *We will Remember Them* May 1998

²³ the full report is available on the Northern Ireland office website, available through www.open.gov.uk

In June 1998 Adam Ingram was appointed Minister for Victims and an initial £5 million was allocated to implement the Bloomfield recommendations. In January 1999 parties represented in the Assembly nominated representatives for victims issues.²⁴ A victims liaison unit has been set up which publishes regular newsletters and a Memorial Fund has been created.

D. 'The Disappeared'

A number of people have been killed by paramilitaries during the Troubles and their bodies have never been recovered. One of the most notorious cases was that of Jean McConville, a mother of ten, who was allegedly abducted by the IRA in 1972.²⁵ In May 1998 Gerry Adams stated that he would try to persuade the IRA to reveal the whereabouts of 'the disappeared' who are said to consist of up to 20 people.²⁶ No official records are kept of the people who have disappeared, but the RUC hold open files on those known as 'The Disappeared'.²⁷

In *We Will Remember Them*,²⁸ Sir Kenneth Bloomfield issued a 'fervent appeal, on behalf of those whose loved ones have disappeared without trace, that those who can offer information about their fate and where bodies may lie should now do so. I realise that many of those in the possession of such information may fear the risk of inculpating themselves, but I am sure cast-iron arrangements could be made, if necessary through trusted intermediaries, to report such information anonymously and in confidence' (para 5.38).

Although the press reported continuing hints of the possibility of information on the whereabouts of burial places no victims have apparently yet been recovered. A member of Jean McConville's family was reportedly told by the IRA at a secret meeting that it was responsible for the death, but that an internal IRA investigation had failed to discover where her body was buried.²⁹ A Families of the Disappeared confidential answer machine service is available.³⁰ INLA is reportedly involved in tracing the remains of one victim who was buried in France.³¹ Republican sources have reportedly failed to find the remains of

²⁴ *NIO Press Notice* 21 January 1999 'Minister welcomes Assembly Nominees to Represent Victims' Issues

²⁵ *Guardian* 13 May 1998 'Family's plea to IRA over fate of mother'

²⁶ *Guardian* 14 May 1998 'Adams gives pledge on IRA victims' *Times* 27 June 1998 'IRA may disclose where missing Catholic victims are buried' lists 10 other 'disappeared' people allegedly abducted by the IRA

²⁷ HC Deb 23 July 1998 vol 316 c 627W

²⁸ April 1998. It is available in full in the Northern Ireland Office website, accessible from www.open.gov.uk

²⁹ *Guardian* 5 December 1998 'IRA admits killing widow who 'disappeared' 26 years ago'

³⁰ *Belfast Telegraph* 23 December 1998 'Disappeared' man's mother 'shattered' by end of search'

³¹ *Belfast Telegraph* 27 February 1999 'Secret grave is found'

Robert Nairac, a British Army captain abducted in the 1970s.³² In March 1999 the IRA made a statement that it had located the graves of nine people; the timing prompted accusations that the statement had been made in order to influence the pre-Easter talks on implementation of the Belfast Agreement.³³ On the same day the British and Irish Government announced that evidence procured in recovering the remains would not be used in prosecutions.³⁴ But in early April there were reports that the IRA had decided not to reveal locations until the necessary legislation had been passed by the British and Irish Governments.³⁵ It also appears that the IRA has warned relatives of the 'Disappeared' against media presence at funeral services and against seeking post mortems.³⁶

II *The Northern Ireland (Location of Victims' Remains) Bill*

The Bill was introduced into the Commons on 28 April. A Press Release from the Northern Ireland Office quoted Mo Mowlam as follows:³⁷

Dr Mowlam said the government's action was entirely designed to relieve years of suffering experienced by families who have not been told where their loved ones have been buried.

She said: "The stories of all victims of the troubles are moving and harrowing but the suffering of the families of the disappeared strikes a deep chord.

"Their suffering has gone on too long and the government acknowledges their overwhelming need to know the locations of their loved ones' remains.

"In light of recent efforts to locate these graves, the UK and Irish Governments are each introducing legislation to make provision about the independent Commission established by Treaty between the two Governments to facilitate the location of the remains of victims. The aim is to have this legislation in place as soon as possible.

"We hope that information will then be forthcoming to the commission about the location of the graves and that post-mortems will be able to establish the identity of the victims and how and when they died."

³² *Financial Times* 31 March 1999 'IRA pledge on victims set to open old wounds'

³³ *Guardian* 30 March 1999 'IRA finds graves of disappeared'

³⁴ *Times* 30 March 1999 'IRA reveals sites of hidden graves' The nine were listed as: Seamus Wright, Kevin McKee, Eamon Molloy, Jean McConville, Columba McVeigh, Brendan McGraw, John McClory, Brian McKinney and Danny McIlhone. *Northern Ireland Office* 29.3.99 'Secretary of State welcomes efforts being made to locate graves of 'the disappeared'

³⁵ *Belfast Telegraph* 8 April 1999 'IRA will not reveal graves'

³⁶ *Guardian* 15 April 1999 'IRA bars press at victims' funerals'

³⁷ *NIO Press Notice* 28 April 1999 'Mowlam introduces legislation to help locate the graves of the disappeared'

"The legislation will also ensure that information given to the Commission, and any evidence which comes to light as a result, will not be used in criminal proceedings:'

Dr Mowlam has also been quoted in press reports as stating that the proposed legislation did not represent an amnesty or immunity and that prosecutions could still take place, but not using any evidence found in discovery of the remains.³⁸

The *Irish Times* has reported that exhumation of the nine bodies whose whereabouts are known to the IRA is expected to begin before the end of May and that Sir Kenneth Bloomfield would be one of the Commission members.³⁹

During Business Questions on 29 April Peter Brooke, chairman of the Northern Ireland Select Committee, expressed concern that in the week in which the Bill is expected to be debated 11 members of his committee would be in the United States, on a pre-arranged visit.⁴⁰

Families of the Disappeared, which represents some of the victims' families, has said that it hoped the legislation would be passed as quickly as possible, and would lead to an immediate IRA statement on the location of the victims.⁴¹ The DUP have indicated that it will oppose the Bill, noting that 'such an amnesty in relation to the Disappeared will prevent the collection of evidence which could be used to bring those responsible for the crimes in the first place to justice'.⁴² Rev Martin Smyth has indicated his opposition to the bill⁴³ and Lord Molyneux and Lord Fitt have also indicated opposition.⁴⁴ The Opposition spokesman Andrew Mackay, will support the legislation according to press reports, while stating that it was a disgrace that the legislation was necessary.⁴⁵

The Bill had its first reading on 27 April; it is due for second reading on 10 May 1999, and the Leader of the House, Margaret Beckett, has announced that it is expected that Commons remaining stages will be taken on 12 May.

³⁸ *Newsletter* 28 April 1999 'Mowlam's 'wake up' call on talks'

³⁹ *Irish Times* 28 April 1999 'Retrieval of IRA victims' bodies could begin before end of May'

⁴⁰ HC Deb 29 April 1999 vol 330 c 480

⁴¹ *Belfast Telegraph* 21 April 1999 'Tribunal on Disappeared'

⁴² *Belfast Telegraph* 21.4.99 'Tribunal on Disappeared'

⁴³ *Newsletter* 28 April 1999 'Mowlam's 'wake up' call on arms'

⁴⁴ *Daily Telegraph* 28 April 1999 'Immunity over IRA victims' bodies'

⁴⁵ *Irish News* 28 April 1999 'Disappeared' commission 'not an amnesty'

A. Legislation in the Republic of Ireland

The *Criminal Justice (Location of Victims' Remains) Bill*⁴⁶ has been introduced into the Dail. It is expected to finish its second stage (reading) on 5 May 1999 and to complete its passage by mid May.

B. The Bill in detail

The Explanatory Notes to the Bill⁴⁷ offer a full explanation and background to the Bill. The Secretary of State has made a statement that in her view the provisions are compatible with the European Convention on Human Rights.

1. The Commission

The British and Irish Governments signed an agreement on 27 April 1999 to establish the Independent Commission for the Location of Victims' Remains.⁴⁸ The text of the Agreement is set out in the schedule to the Irish bill, but is not contained in the UK bill.⁴⁹ Its functions will include 'receiving relevant information and disclosing such information for the purpose of facilitating the location of the remains to which the information relates'. The Explanatory Notes state that it is likely that the Commission will enjoy immunities and privileges largely similar to those conferred on the Independent International Commission on Decommissioning.⁵⁰

Under clause 2(5) the section establishing the Commission will come into force when a commencement order is signed by the Secretary of State 'after consulting the Minister for Justice, Equality and Law Reform of the Government of Ireland'. This is an unusual provision, allowing formal consultation with another state, before commencement. The Explanatory Notes state that the Commission will be an international organisation and so section 2 needed to be brought into force to coincide with the parallel provisions in the Irish legislation. A similar provision applied in the *Northern Ireland Arms Decommissioning Act 1997* to bring the Independent International Commission on Decommissioning into effect.⁵¹ The Irish bill contains similar provisions allowing for consultation with the Secretary of State on commencement.⁵²

⁴⁶ Bill 22 of 1999

⁴⁷ *Bill 92-EN*

⁴⁸ Cm 4344 May 1999

⁴⁹ it is common for the text of international agreements to be appended to Irish bills, but less common in the UK

⁵⁰ by SI 1997/2231, made under section 7(2) of the 1997 Act

⁵¹ S7(5)

⁵² clause 13(2) provides for the Act to come into effect after consultation with the Secretary of State

The Commission is expected to have a limited life linked to the task of locating the remains and there are provisions to allow its winding up, in consultation with the Irish Government. However no specific date is set for the Commission to cease to exist.

Press reports have indicated that the Commission would consist of one representative from the Republic, one from Northern Ireland and one an international figure.⁵³ The Explanatory Notes state that the Commission would comprise no more than three members and costs would be in the region of £100,000 which would be borne jointly by the British and Irish governments.

2. The Scope of the Bill

The Bill would only cover killings which took place before the date of the Belfast Agreements (10 April 1998) which were the result of an act of violence connected with an organisation which are currently proscribed in Northern Ireland for the purposes of Schedule 2 of the *Northern Ireland (Emergency Provisions) Act 1996*. According to the Explanatory Notes these are:

The Irish Republican Army, Cumann na mBan, Fianna na hEireann, The Red Hand Commando, Saor Eire, The Ulster Freedom Fighters, The Ulster Volunteer Force, The Irish National Liberation Army, The Irish People's Liberation Organisation, The Ulster Defence Association, The Loyalist Volunteer Force, The Continuity Army Council, The Red Hand Defenders and the organisation using the name "The Orange Volunteers" and being the organisation in whose name a statement described as a press release was published on 14 October 1998.⁵⁴

Only information which relates to the whereabouts of the remains of a victim of violence (relevant information) will trigger the protection of the Bill.

3. Evidence in Criminal Proceedings

The Explanatory Notes make clear that where 'relevant information' leads to the recovery of other items, whether in the course of search for the remains or as a result of matters discovered during that search, all such evidence would be inadmissible in any criminal proceedings anywhere in the United Kingdom. Private prosecutions would also be covered. There is provision in clause 3(2) for the admissibility of evidence only where it would be adduced in criminal proceedings on behalf of an accused person.

⁵³ *Belfast Telegraph* 21 April 1999 'Tribunal on Disappeared'

⁵⁴ The Orange Volunteer and the Red Hand Defenders were proscribed in March 1999 by order under s30(3) of the 1996 Act (*Northern Ireland Office Press Notice* 3 March 1999 'Mowlam moves on paramilitary organisations') Organisations on ceasefire and not on ceasefire are included, as this list relates to proscribed organisations, and is separate from the *Northern Ireland (Sentences) Act 1998* provisions

Under s 5 of the *Northern Ireland Arms Decommissioning Act 1997*, passed by the Major Government, a decommissioned article, or information derived from it, is not admissible in evidence in criminal proceedings. The same exemption in favour of evidence which could assist the accused also applies. The 1997 Act also provides that no proceedings will be brought for a scheduled⁵⁵ offence 'in respect of anything done in accordance with a decommissioning scheme' (s 4). There are also some parallels in the inadmissibility of evidence obtained through the interception of communications.⁵⁶

4. Forensic Testing

Forensic testing of remains or other recovered items are restricted through the operation of clause 4. Forensic tests cannot be carried out to discover information about the circumstances of the death of the victim. The precise purposes for which tests cannot take place is listed in clause 4(1)(a-f). There is an exemption for inquest purposes, to assist with establishing identity and to find out how, when and where the victim died. Another exemption would establish whether an item could be moved, so that situations where explosives or other potentially dangerous items are uncovered, can be dealt with. S6 of the *Northern Ireland Arms Decommissioning Act* also prohibited forensic tests for certain purposes in relation to decommissioned articles.

A coroner's inquest is an inquisitorial process aimed at finding facts, rather than an adversarial criminal trial. Its function is to seek out and record as many of the facts concerning the death as the public interest requires. In Northern Ireland, unlike in England and Wales, the holding of an inquest for inquiring into the death of a person is discretionary rather than mandatory.⁵⁷ Northern Ireland coroners make 'findings' rather than verdicts as in England and Wales and so a verdict of 'unlawful killing' is precluded.⁵⁸ Rule 15 of the 1963 Rules⁵⁹ requires the proceedings and evidence at an inquest to be directed solely to ascertaining who the deceased was, and 'how, when and where the deceased came by his death.. Rule 16 provides against an opinion of questions of civil liability or criminal culpability. Leckey and Greer have referred to the *Jamieson* case which is the leading authority in England and Wales, and which has been approved and followed in Northern

⁵⁵ scheduled offence means an offence listed in the Schedule to the 1997 Act

⁵⁶ s 9 *Interception of Communications Act 1985* and s3(5) of the *Criminal Procedure and Investigation Act 1996*. The *Inquiry into Legislation Against Terrorism* Cm 3420 October 1996 Chapter 7 conducted by Lord Lloyd of Berwick has comments on the value or otherwise of these sections

⁵⁷ See *Coroners' Law and Practice in Northern Ireland* 1998 John Leckey and Desmond Greer Chapter 7 for background

⁵⁸ *Coroners (Practice and Procedure) (Amendment) Rules (Northern Ireland) 1980* This followed a recommendation of the Brodrick Committee *Report of the Committee on Death Certification and Coroners* Cmnd 4810 1971 which was implemented only in Northern Ireland

⁵⁹ *Coroners (Practice and Procedure) Rules (NI) 1963* SR &O 1963 no 199 as amended

Ireland, as an authoritative statement of the proper scope of the enquiry to be carried out by the coroner:⁶⁰

7-05 The principles set out in *Jamieson* and the earlier English cases were approved and adopted by the Court of Appeal in Northern Ireland in *Re Ministry of Defence's Application*, and in *In re Bradley and Larkin's Application* the law relating to the proper scope and function of an inquest was conveniently summarised by Carswell LJ in the following terms:

"1. A coroner's inquest is an inquisitorial process, a fact finding process and not a method of apportioning guilt. In this respect it is unlike a trial: *R v South London Coroner, ex parte Thompson* (1982) 126 Sol J 625, *per* Lord Lane CJ.

2. The jury are to find 'how the deceased came by his death'. The word 'how' means 'by what means' rather than 'in what broad circumstances'. The enquiry must focus on matters directly causative of death: *R v HM Coroner for Western District of East Sussex, ex parte Homberg* (1994) 158 JP 357, 369, *per* Simon Brown LJ. It should not embark on a wider inquiry relating to the background circumstances of the death; it is not its function to provide the answers to all the questions related to the death which the next of kin may wish to raise: *Re Ministry of Defence's Application* at page 40.

3. Although the Brodrick Report stated that one of the purposes of an inquest is to 'allay rumours or suspicions', this purpose should be confined to allaying rumours or suspicions about the means by which the deceased came by his death, not about the broad circumstances in which he came by his death: *Re Ministry of Defence's Application* at page 51.

4. It is a highly desirable objective of the coroner's jurisdiction that the proceedings should be summary and speedy: *R v HM Coroner for Western District of East Sussex, ex parte Homberg* (1994) 158 JP 357, 373, *per* Simon Brown LJ."

'Interested persons'⁶¹ at an inquest are entitled to examine witnesses, either in person or by a barrister or solicitor. Because of the nature of an inquest, as there are no opposing parties, there is no process in the coroner's court for interested persons to see or obtain copies of relevant documents in the hands of others before the hearing. There is no general right to be provided with material such as forensic science reports in advance of the inquest.⁶²

⁶⁰ *Coroners' Law and Practice in Northern Ireland* 1998 John Leckey and Desmond Greer p 134. See also discussion on pp 135-136

⁶¹ coronial practice in Northern Ireland has been to consider that interested persons include next of kin of the deceased or personal representative, and any person who may in some way be responsible for the death. The coroner can also decide if anyone else is an interested person. Leckey and Greer note that coroners in Northern Ireland also look to guidance to England and Wales where a parent child or spouse and the chief officer of police would be included. (p 149-50)

⁶² see *Coroner's Law and Practice in Northern Ireland* p 209 which notes that the absence of an equivalent to discovery has not been held in breach of the rules of natural justice

However the coroner will normally make available to any interested person in advance of the inquest copies of the post mortem report and forensic reports etc.

Only the coroner has the power to call witnesses and to compel production of documents. The coroner would have the power to order forensic tests only to establish the limited questions of identity and the 'how, where and when' questions, rather than wider tests on items retrieved with the body. The Irish bill provides that a coroner in the Republic cannot summon the Commission to give evidence at an inquest.⁶³

The clause prohibits persons who have received human remains, either directly or indirectly, as a result of relevant information being provided to the Commission, from causing forensic tests to be made. This would presumably exclude investigative journalists and others from carrying out tests for their own purposes. No new criminal offence is created however, and no specific penalty for breach is set out in the Bill. Presumably if it became clear that an attempt to conduct forensic tests was being made, a request for an injunction could be made to the Attorney General. The prohibition does not appear to apply to remains found other than through information being made available to the Commission.

5. Disclosure of Information

Under clause 5 relevant information is not to be disclosed to anyone apart from the purpose of facilitating the location of the remains. The Commission has discretion under 5(2) to disclose to 'members of a victim's family' the fact that relevant information has been supplied and the place where the remains may be found. The term members of the family is not specifically defined in the legislation and in theory might extend to members other than the immediate family. For coroners' inquests 'interested persons' include next of kin and a parent, child or spouse, but not other family members. There is no explicit linkage between clauses 4 and 5. The 'relevant information' would relate only to information as to the whereabouts of the remains, not to evidence gathered with the remains, and so the effect of its unauthorised disclosure would be limited. The Bill does not provide that a criminal offence would be committed if there is unauthorised disclosure. There are similar provisions in the Irish bill (clause 6). In addition the Irish bill provides that the communications of the Commission would be exempt from the provisions of the *Freedom of Information Act 1997* (clause 9).

⁶³ *Criminal Justice (Location of Victims' Remains) Bill 1999* clause 10

6. Powers of Entry

Specific powers of entry are provided for in the Bill since, in searching for the remains of victims, the police will not be conducting criminal investigations and it would, as the Explanatory Notes state, be 'inappropriate for them to seek warrants under the provisions of the *Police and Criminal Evidence (Northern Ireland) Order 1989* or equivalents in Great Britain'.⁶⁴ Clause 6 makes provision for the grant of warrants authorising entry and search of private premises by a resident magistrate in Northern Ireland or a Justice of the Peace in Great Britain if the Commission has certified that remains are likely to be found at the premises in question and it is not practicable to communicate with the person entitled to allow entry or entry would not be granted without a warrant.

⁶⁴ *The Police and Criminal Evidence Act 1984*